

123 FERC ¶ 61,305
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

American Transmission Company, LLC

Docket No. TS06-13-000

ORDER ON REQUEST FOR CLARIFICATION

(Issued June 25, 2008)

1. On November 21, 2006, the Interconnected Generators¹ filed a request for clarification of the Commission's October 19, 2006 order² on American Transmission Company, LLC's (ATC) request for clarification of the information disclosure prohibitions of the standards of conduct.³ In the October Order, the Commission held

¹ The Interconnected Generators include Wisconsin Electric Power Company, Wisconsin Public Service Corporation, and Upper Peninsula Power Company. The Interconnected Generators represent three of American Transmission Company, LLC's (ATC) seven marketing and energy affiliates.

² *American Transmission Co., LLC*, 117 FERC ¶ 61,061 (2006) (October Order).

³ *See, Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *see Standards of Conduct for Transmission Providers*, Order No. 690, 72 Fed. Reg. 2,427 (Jan. 19, 2007), FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, 72 Fed. Reg. 14235 (Mar. 27, 2007), FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, 72 Fed. Reg. 3,958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007); Notice of Proposed Rulemaking, 73 Fed. Reg. 16,228 (Mar. 27, 2008), FERC Stats. & Regs. ¶ 32,630 (2008).

that section 358.5(b)(8) of the Commission's regulations (Subsection 8)⁴ prohibits ATC from engaging in certain non-public communications concerning proposed transmission system outages with its marketing or energy affiliates. In the instant filing, the Interconnected Generators request that the Commission clarify whether Subsection 8 permits non-public communications that are more limited in scope than those the Commission rejected in the October Order. The Interconnected Generators also request that the Commission clarify when the prohibition on communications between transmission function employees and marketing or energy affiliates is lifted, and whether the Commission intended to distinguish between the terms "affected generators" and "marketing representatives" in a specific statement in the October Order.

2. As discussed below, we clarify that the more limited non-public communications proposed by the Interconnected Generators in the instant filing are permissible under Subsection 8, provided that ATC does not give preferential treatment to its marketing or energy affiliates in engaging in these limited communications. We further clarify that the prohibition on communications between transmission function employees and marketing or energy affiliates is lifted when the proposed outage has been publicly posted as "submitted" on the "outage scheduler" section of Midwest ISO's Open Access Same-Time Information System (OASIS), and that the Commission intended "affected generators" to be synonymous with "marketing representatives" in the statement that the Interconnected Generators find to be ambiguous.

Background

3. ATC is an electric transmission provider subject to the Commission's Standards of Conduct, including Subsection 8. In August of 2006, in Docket No. TS06-13-000, ATC requested that the Commission clarify whether the Standards of Conduct permit an electric Transmission Provider's transmission function employees to engage in certain non-public communications with its marketing or energy affiliates' marketing representatives in order to coordinate planned transmission system outages. ATC stated that it was preparing for \$3.4 billion in transmission upgrades and wanted to discuss, plan and coordinate with its marketing and energy affiliates upcoming outages, the impact of outages, transmission capability, maintenance activities and expansion plans before the details of this information would be made public via the OASIS. ATC claimed that two sections of the Standards of Conduct provided conflicting guidance on this question.

4. ATC observed that section 358.5(b)(1) of the Commission's regulations (the Prohibited Disclosure Rule) prohibits electric Transmission Providers from disclosing

⁴ Subsection 8 states that "[a] Transmission Provider is permitted to share information necessary to maintain the operations of the transmission system with its Energy Affiliates." 18 C.F.R. § 358.5(b)(8) (2007).

any information, including “information about available transmission capacity, price, curtailments, storage, ancillary services, balancing, maintenance activity, capacity expansion plans, or similar information,” to their marketing or energy affiliates through non-public communications.⁵ ATC also observed, however, that Subsection 8 allows electric Transmission Providers to share “information necessary to maintain the operations of the transmission system” with their marketing or energy affiliates.⁶ ATC stated that it was unclear whether non-public communications with its marketing or energy affiliates’ marketing representatives for the purpose of coordinating planned transmission system outages are permitted under Subsection 8 or forbidden by the Prohibited Disclosure Rule. ATC stated that it envisioned that these communications would cover “. . . discussions covering generator operations that result in a mutually acceptable period of time when the transmission system outage may be scheduled.”⁷ Accordingly, ATC requested that the Commission clarify whether, prior to any public posting on Midwest ISO’s OASIS, it may engage in such communications. ATC further requested that the Commission hold that after an outage has been approved and publicly posted on Midwest ISO’s OASIS, transmission function employees may directly contact marketing representatives to confirm a generating unit’s status during an outage.⁸

5. The Interconnected Generators filed comments supporting ATC’s request. According to the Interconnected Generators, by clarifying that ATC could engage in the

⁵ 18 C.F.R. § 358.5(b)(1) (2007). The Prohibited Disclosure Rule states that:

An employee of the Transmission Provider may not disclose to its Marketing or Energy Affiliates any information concerning the transmission system of the Transmission Provider or the transmission system of another (including, but not limited to, information received from non-affiliates or information about available transmission capability, price, curtailments, storage, ancillary services, balancing, maintenance activity, capacity expansion plans, or similar information) through non-public communications conducted off the OASIS or Internet Web site, through access to information not posted on the OASIS or Internet Web site that is not contemporaneously available to the public, or through information on the OASIS or Internet Web site that is not at the same time publicly available.

⁶ *Id.* § 358.5(b)(8).

⁷ *See* October Order, 117 FERC ¶ 61,061 at P 3.

⁸ *Id.* Communications with a marketing or energy affiliate after OASIS postings are currently permitted under the Standards of Conduct. 18 C.F.R. §358.5(b)(1) (2007).

requested communications, the only information that ATC would be permitted to communicate would be the need for a generator to increase or decrease output, the need to take a unit off-line, and the timing of these actions.⁹

The October Order

6. In the October Order, the Commission held that, prior to any public posting of a scheduled outage on OASIS, Subsection 8 does not permit ATC to engage in the communications ATC proposed.¹⁰ The Commission explained that the Prohibited Disclosure Rule forbids electric Transmission Providers from disclosing any information concerning their transmission system “through non-public communications conducted off the OASIS or Internet website, through access to information not posted on the OASIS or Internet website that is not contemporaneously available to the public, or through information on the OASIS or Internet website that is not at the same time publicly available.”¹¹ The Commission further explained that Subsection 8 was intended to allow electric Transmission Providers to communicate “information necessary to operate and maintain the transmission system on a day-to-day basis,” not to allow electric Transmission Providers to share “transmission or marketing information that would give a Transmission Provider’s marketing or energy affiliate undue preference over a Transmission Provider’s nonaffiliated customers in the energy marketplace.”¹² Finally, the Commission found that granting ATC’s request would permit much broader discussions than those specified by the Interconnected Generators in their comments:

Far from single, isolated communications, AT[C]’s proposal would permit it to engage marketers in a continuous dialogue concerning tentative, future, and only potential outages. In sum, as it prepares for \$3.4 billion in transmission upgrades, AT[C] wants to discuss, plan and coordinate with its marketing and energy affiliates upcoming outages, the impact of outages, transmission capability, maintenance activities and expansion plans before the details of this information is made public via the OASIS. These types

⁹ October Order, 117 FERC ¶ 61,061 at P 6.

¹⁰ *Id.* P 7.

¹¹ *Id.* (citing 18 C.F.R. § 358.5(b)(1)).

¹² *Id.* P 8 (citing Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166 at P 112 (2004)).

of communications are explicitly prohibited under the Prohibited Disclosure Rule, and are not ‘necessary to operate and maintain the transmission system on a day-to-day basis.’¹³

7. Although the Commission declined to grant ATC’s request, it did agree with ATC that once the transmission system outage has been scheduled, approved by Midwest ISO, and publicly posted on the “outage scheduler” section of Midwest ISO’s OASIS, transmission function employees may directly contact marketing representatives to confirm that the generating unit affected by the transmission system outage will be available (or offline, as the case may be) during the transmission system outage.¹⁴ The Commission also offered ATC a model to help simplify its current coordination process. The Commission stated that ATC could post a desired outage period on its OASIS or Internet website, engage in individual conversations with affected generators, and then post the final outage dates on its OASIS.¹⁵ The Commission stated that under this model ATC would be free to confirm the specific details of publicly announced outages with marketing representatives under Subsection 8.¹⁶

The Interconnected Generators’ Request for Clarification

8. In the instant filing, the Interconnected Generators request that the Commission clarify whether more limited non-public communications than those rejected by the Commission’s October Order are permissible under Subsection 8. Specifically, the Interconnected Generators request that the Commission clarify whether ATC is permitted to directly communicate with its marketing or energy affiliates’ marketing representatives about the need for a generator to increase or decrease output, the need to take a unit off-line, and the timing of these actions.¹⁷ The Interconnected Generators note that in the October Order, the Commission contrasted the breadth of communications permissible under ATC’s request with the Interconnected Generators’ assertion that ATC needs to communicate only these three limited pieces of information to efficiently coordinate a transmission system outage.¹⁸

¹³ *Id.* P 9.

¹⁴ *Id.* P 10.

¹⁵ *Id.* P 9.

¹⁶ *Id.*

¹⁷ Interconnected Generators’ Request for Clarification at 3-4.

¹⁸ *Id.* at 3.

9. The Interconnected Generators also request that the Commission clarify two statements in the October Order. First, the Interconnected Generators request that the Commission clarify when the prohibition on communications between transmission function employees and marketing or energy affiliates is lifted.¹⁹ The Interconnected Generators state that the following language from the October Order is ambiguous:

We clarify that, *prior to any public posting of the scheduled outage* on OASIS, communications between transmission function employees and marketers as AT[C] proposes are outside the scope of Subsection 8.²⁰

10. The Interconnected Generators explain that Midwest ISO posts transmission outages to its OASIS when the transmission outage is first “submitted,” updates that posting when the proposed transmission outage is “under study,” and updates it again when it is “approved.”²¹ The Interconnected Generators state that the October Order appears to prohibit communications between transmission function employees and marketing or energy affiliates until the outage is actually “approved.”²² Accordingly, the Interconnected Generators request that the Commission clarify that ATC’s transmission function employees may engage in non-public communications with its marketing or energy affiliates’ marketing representatives when a proposed transmission outage has been “submitted,” or has been publicly posted, regardless of its status.²³ The Interconnected Generators argue that it “is unclear why such publicly-available information cannot be shared with marketers when it is first posted to the MISO [Midwest ISO] OASIS as ‘submitted’.”²⁴

11. Next, the Independent Generators request that the Commission clarify whether it intended “affected generators” to be synonymous with “marketing representatives” in the following statement in the October Order:

[I]t appears that AT[C] can simplify its current process by posting a desired outage period on its OASIS or Internet website, engaging in individual

¹⁹ *Id.*

²⁰ *Id.* at 5 (citing October Order, 117 FERC ¶ 61,061 at P 7) (emphasis added by Interconnected Generators).

²¹ *Id.*

²² *Id.* at 5-6.

²³ *Id.* at 5-6.

²⁴ *Id.* at 6.

conversations with *affected generators*, and then posting the final outage dates on its OASIS. Under this model, AT[C] would be free to confirm the specific details of publicly announced outages with *marketing representatives* under Subsection 8.²⁵

Commission Determination

12. In this order, we clarify that ATC may, under Subsection 8, directly communicate with its marketing or energy affiliates' marketing representatives about the need for a generator to increase or decrease output, the need to take a unit off-line, and the timing of these actions, provided that these communications will not result in preferential treatment for its marketing or energy affiliates.²⁶ Contrary to the communications about tentative, future and potential outages and coordinated planning that the Commission rejected in the October Order, we clarify that ATC may communicate to the Interconnected Generators generator-related information that specifically and directly relates to the day-to-day operation and maintenance of the transmission system.²⁷ Moreover, to the extent that ATC engages in these types of communications with its affiliates, it must do so with its non-affiliates on a non-discriminatory basis. ATC cannot operate its transmission system to preferentially benefit its marketing or energy affiliates.²⁸

13. We further clarify that the prohibition on communications between transmission function employees and marketing or energy affiliates is lifted when the proposed outage has been publicly posted on the "outage scheduler" section of Midwest ISO's OASIS, even if the proposed outage is marked only as "submitted." In the October Order, the Commission stated that the prohibition on communication was lifted, "[o]nce the transmission system outage has been scheduled, *approved by Midwest ISO, and publicly posted on the "outage scheduler" section of Midwest ISO's OASIS.*"²⁹ In making this

²⁵ *Id.* at 4-5 (citing October Order, 117 FERC ¶ 61,061 at P 9) (emphasis added by Interconnected Generators).

²⁶ *See* 18 C.F.R. § 358.5(c)(5) (2007).

²⁷ We note that in Order No. 2004-B, the Commission reiterated that Subsection 8 is intended to allow "information necessary to operate and maintain the transmission system on a day-to-day basis; it does not include transmission or marketing information that would give a Transmission Provider's Marketing or Energy Affiliate undue preference over a Transmission Provider's nonaffiliated customers in the energy marketplace." Order No. 2004-B, 108 FERC ¶ 61,118 at P 112 (2004).

²⁸ 18 C.F.R. § 358.2(b)(2) (2007).

²⁹ October Order, 117 FERC ¶ 61,061 at P 1, P 10 (emphasis added).

statement, the Commission was addressing the fact that ATC should not be engaging in non-public discussions with its marketing or energy affiliates prior to any public posting of a proposed outage on OASIS.³⁰ However, in the instant filing, the Interconnected Generators have presented information about Midwest ISO's OASIS process that was not in the record at the time of the October Order. Specifically, the Interconnected Generators explain that Midwest ISO posts transmission outages to its OASIS when the transmission outage is first "submitted," updates that posting when the proposed transmission outage is "under study," and updates it again when it is "approved." Given this information, we clarify that once the proposed outage is publicly posted on Midwest ISO's OASIS, even if marked as "submitted," the prohibition on communications between transmission function employees and marketing or energy affiliates ends. We note again here that any such discussions must not result in preferential treatment for any marketing or energy affiliate.³¹

14. Finally, we clarify that in the October Order, the Commission intended the term "affected generators" to refer to all generators—affiliated and non-affiliated—affected by a proposed outage and that this term was meant to include the "marketing representatives" of such generators.

³⁰ *See id.* P 7 (clarifying that "prior to any public posting of the scheduled outage on OASIS, communications between transmission function employees and marketers as AT[C] proposes are outside the scope of Subsection 8"), P 9 (stating that "it appears that AT[C] can simplify its current process by posting a desired outage period on its OASIS or Internet website, engaging in individual conversations with affected generators, and then posting the final outage dates on its OASIS. Under this model, AT[C] would be free to confirm the specific details of publicly announced outages with marketing representatives under Subsection 8").

³¹ Additionally, on March 21, 2008, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing a series of reforms to the Standards of Conduct. While the NOPR proposes to make certain revisions to the information sharing prohibitions of section 358.5(b) of the Commission's regulations, the fundamental principle prohibiting a transmission provider's transmission function from preferentially disclosing non-public transmission information to marketing function employees is retained. *See* NOPR, 73 Fed. Reg. 16, 228 at proposed section 358.6. The reforms proposed in the NOPR, even if adopted as a final rule, do not appear to affect the request for clarification or the Commission's decision with respect to the Prohibited Disclosure Rule. While the NOPR proposes to exclude energy affiliates from the Standards of Conduct, the clarification is meaningful because ATC has both energy and marketing affiliates. We note that ATC, like other transmission providers, will have to comply with any new or revised requirements that may be adopted under a final rule.

The Commission orders:

The Commission hereby provides clarification as set forth in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.